PD-1096-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/2/2020 7:04 PM
Accepted 3/3/2020 10:07 AM
DEANA WILLIAMSON
CLERK

No. PD-1096-19

In the
Court of Criminal Appeals
of Texas

FILED
COURT OF CRIMINAL APPEALS
3/3/2020
DEANA WILLIAMSON, CLERK

EX PARTE CHRISTOPHER RION,

APPLICANT/APPELLANT

On the State's Petition for Discretionary Review from The Court of Appeals for the Fifth District of Texas at Dallas
In Cause No. 05-19-00280-CR
from Dallas County

STATE'S BRIEF

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

JOSHUA VANDERSLICE
Assistant District Attorney
State Bar No. 24095824
Frank Crowley Courts Building
133 N. Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399
(214) 653-3625 | (214) 653-3643 *fax*
joshua.vanderslice@dallascounty.org

Attorneys for the State of Texas

Oral argument requested and granted.

IDENTITY OF PARTIES AND COUNSEL

Appellant: **Christopher Rion**

Represented by:

Trial Counsel

Kirk Lechtenberger
183 Parkhouse Street
Dallas, Texas 75206

Writ/Appellate Counsel

Michael Mowla
P.O. Box 868
Cedar Hill, TX 75106

Appellee: **The State of Texas**

Represented by:

The Criminal District Attorney of Dallas County
John Creuzot

Assistant District Attorneys
Scott Wells (trial prosecutor)
Sable Taddesse (trial prosecutor)
Brian Higginbotham (writ/appellate prosecutor)
Joshua Vanderslice (appellate prosecutor)

Dallas County District Attorney's Office
Frank Crowley Courts Building
133 North Riverfront Boulevard, LB–19
Dallas, Texas 75207-4399

Trial Judge: **Hon. Carter Thompson**
Presiding Judge
Criminal District Court No. 5
Frank Crowley Courts Building
133 N. Riverfront Boulevard, LB-42
Dallas County, Texas

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Appellant crashed his car into another car occupied by two people, a passenger and a driver. A grand jury returned two indictments, charging him with 1) manslaughter of the passenger, who died; and 2) aggravated assault of the driver, who lived. (CR at 8, 661); *see* Tex. Penal Code §§ 19.04, 22.02. After a jury acquitted Appellant of the manslaughter, Appellant filed a pretrial habeas application in the aggravated assault case based on collateral estoppel. (2 Suppl. at 10; CR at 91). The trial court denied habeas relief, but the court of appeals reversed. (CR at 706); *Ex parte Rion*, No. 05-19-00280-CR, 2019 WL 4386371, at *9 (Tex. App.—Dallas Sept. 13, 2019, pet. granted). This Court granted the State's petition for discretionary review to decide whether an acquittal on the charge that Appellant recklessly caused the death of the passenger bars Appellant's prosecution for recklessly causing serious bodily injury to the driver.

STATEMENT REGARDING ORAL ARGUMENT

In its petition for discretionary review, the State requested oral argument. The Court has granted oral argument.

ISSUE PRESENTED

Collateral estoppel applies only when two issues are identical. Under the doctrine of collateral estoppel, does a prior jury finding that Appellant "recklessly caused the death" of one victim estop litigation of whether he "recklessly caused bodily injury" to a different victim?

STATEMENT OF FACTS

Appellant loved his 2014 Dodge Challenger with a red racing stripe. (CR at 354). He pressed the gas pedal to the floor "as hard as he could mash it." (CR at 285–86).

The cars ahead were stopped at a red light. (CR at 253). Without braking, Appellant swerved to avoid them, hopping the median. (CR at 217, 242) Though he was now on the wrong side of the road, he kept the gas pedal on the floor. (CR at 217–18, 287–89). He swerved again to avoid a light pole, and crashed head-on into a large SUV waiting to turn left across the intersection. (CR at 218–19, 237, 242, 216). Appellant's Challenger hit the SUV at 71 miles per hour, impelling it 35–40 yards backward and up a grassy berm. (CR at 238, 586).

Appellant attempted to climb a fence, only to be wrangled by a bystander. (CR at 255). However, the police would later release (rather than arrest) him. (CR at 254-55, 270).

With her SUV's dashboard pressed into her chest, Claudia Loehr reached for and grasped the hand of her 83-year-old aunt, Claudena Parnell. (CR at 221). The SUV slowly rolled back down into the street. (CR at 220). "Are you okay?" Loehr asked. (CR at 221). Parnell replied, "I don't know." (CR at 221).

Good Samaritans and eventually uniformed police and medical personnel rushed to Loehr and Parnell's aid. A Dallas Fire & Rescue paramedic at the scene said that neither Loehr nor Parnell was "low sick," a term used to describe a "decent chance" of

death. (CR at 268). An off-duty police officer agreed that neither Loehr nor Parnell was "low sick." (CR at 268). Loehr lived. (CR at 212).

Four days later, Parnell passed away at the hospital from "blunt force injuries and/or complications." (CR at 232, 307, 638). In addition to her injuries caused by the collision, Parnell suffered from hypertensive cardiovascular disease, which had enlarged her heart and damaged her kidneys. (CR at 307, 638). While recovering from the repair of a femur fracture sustained in the collision, she developed progressive renal failure and suffered acute cardiac arrest. (CR at 307, 638). Parnell was resuscitated, but life support measures were ultimately discontinued. (CR at 296, 638).

Regarding Parnell, the Dallas County grand jury returned an indictment charging Appellant with manslaughter. (CR at 661). Regarding Loehr, the grand jury returned a separate indictment charging Appellant with aggravated assault with a deadly weapon, his car. (CR at 8). Appellant asked to join the cases for trial, arguing that the prosecutor should have to testify to why the cases were not joined. (CR.40, 145–153). The cases were not joined, and the Parnell manslaughter case was tried to a jury. (CR.133–661).

The Defense

In the manslaughter trial, Appellant's trial attorneys put on a clinic of holistic representation. They attacked the recollections of, and obtained concessions from, the State's witnesses. (CR at 184–88, 232, 243–49, 270–74, 327–31). While cross examining the medical examiner, a defense attorney asked a series of questions insinuating that the

"accident" that caused Appellant's death had occurred at the hospital the date the autopsy report was signed, which would have put even more time between the collision and Parnell's death. (CR at 308). The prosecutor redirected the medical examiner, clarifying only the date of Parnell's death. (CR at 308).

Appellant also presented a defense based on his mental health. Through early questioning of the State's witnesses, he established that a "mental health breakdown" is not something that a person can control. (CR at 185–86). Appellant, who was 42 at the time of trial, testified to an assortment mental-health diagnoses he has been managing with medication since age nine: major anxiety, obsessive-compulsive disorder, ADHD, and major depression. (CR at 342, 344–47, 437). An expert testified that she had diagnosed Appellant with "generalized anxiety with panic attacks," bipolar—not otherwise specified, and depression. (CR at 422). The expert explained that panic attacks can turn into psychotic breaks, causing a loss of mental and physical faculties. (CR at 416–17). If you have a psychotic break, you may black out and lose your memory of the incident. (CR at 417). Appellant testified that he had no memory of driving, but that he was particularly stressed by his grocery bill, panicked, and took the wrong exit out of the store parking lot. (CR at 359, 362, 366, 373). Appellant has never had such an incident before, and testified that he had no reason to believe anything bad would happen that day. (CR at 362, 377).

In closing, one of Appellant's lawyers argued that Appellant was "not aware of the risk" when he decided to drive because he had never had a "break" before. (CR at

503). He asked the jury not to consider mental health an "excuse," but rather a "perspective," urging, "You all know what I'm saying resonates with you. It makes sense." (CR at 505). Appellant's other lawyer argued that *reckless* means *intentional*, and asked, "What evidence do you have that he gunned that engine; that he did anything intentional?" (CR. at 513). She continued, questioning the State's evidence that Appellant intended to cause or did not care about causing death:

> What evidence do you have of Chris' bad driving? What evidence do you have of drag racing? What evidence do you have of malice in his heart? What evidence do you have that there was no medical condition? What evidence do you have that this is somebody that didn't care about human life?

(CR at 516).

The Jury Charge

The jury was asked to consider two offenses: Manslaughter as alleged in the indictment, and criminally negligent homicide as a lesser-included offense. (2 Suppl. at 5–6). Recklessness and criminal negligence were defined, but Appellant did not request a voluntariness instruction, and the trial court did not include one. (2 Suppl. 3–9).

The jury acquitted Appellant of both manslaughter and criminally negligent homicide. (2 Suppl. at 10).

The Habeas Application and Appeal

In the aggravated assault case, Appellant filed a pretrial application for a writ of habeas corpus, alleging that almost all of the facts of the transaction had necessarily been decided in the manslaughter trial. (CR at 110). The trial court rejected that

position, noting that Appellant conceded many of the basic facts in the manslaughter trial, so those facts were not necessarily decided against the State. (1 Suppl. at 10–11).

In paragraph 42 of the application, Appellant added, "And the jury already found that Defendant did not act recklessly." (CR at 112). The trial court construed this as a specific claim that collateral estoppel barred re-litigation of the *reckless* culpable mental state in the aggravated assault prosecution. (1 Suppl. at 11, 13). The trial court explained that manslaughter, criminally negligent homicide, and aggravated assault are all result-oriented offenses, meaning the culpable mental state applies to the result. (1 Suppl. at 14). The culpable mental states for manslaughter and criminally negligent homicide apply to death, while the culpable mental state in aggravated assault applies to bodily injury, so the trial court reasoned that the first jury did not deliberate on the culpable mental state element that would require proof in the aggravated assault trial. (1 Suppl. at 11–14) Consequently, the trial court denied habeas relief. (1 Suppl. at 18, 21).

The court of appeals reversed, finding that Appellant's "reckless" mental state was necessarily decided against the State in the Parnell manslaughter trial. *Ex parte Rion*, No. 05-19-00280-CR, 2019 WL 4386371, at *8 (Tex. App.—Dallas Sept. 13, 2019, pet. granted). The court of appeals held that Appellant's acquittal for Parnell's manslaughter collaterally estopped the State from litigating Appellant's recklessness with regard to the risk that he would cause serious bodily injury to Loehr. *Id.* at 9. Despite characterizing its decision as reversing the trial court's denial of pretrial habeas relief, the court of appeals thought the prosecution could proceed in the Loehr aggravated assault case,

reasoning that the State could still litigate whether Appellant acted with the greater culpable mental states of intentionally or knowingly. *Id.*

SUMMARY OF THE ARGUMENT

To the extent collateral estoppel applies in criminal cases, it does not apply here. Collateral estoppel prevents re-litigation of facts necessarily decided in a former trial. Nothing in Appellant's manslaughter trial was necessarily decided. Considering the defense theory and the evidence as filtered through the jury charge, there were multiple rational paths to acquittal. Consequently, no single discrete fact finding can be given preclusive effect, because no particular fact had to be resolved in the defendant's favor to warrant the jury's *not guilty* verdict.

Even if the jury had necessarily decided that Appellant lacked the reckless culpable mental state to commit manslaughter, the culpable mental state issue in the pending aggravated assault trial is not identical. The jury in Appellant's manslaughter trial was asked to decide whether Appellant caused Parnell's death, and whether Appellant consciously disregarded a substantial and unjustifiable risk that Parnell would die as a result of his conduct. The jury in Appellant's pending aggravated assault case will be asked to decide whether Appellant caused bodily injury to Loehr, and whether Appellant consciously disregarded a substantial and unjustifiable risk that Loehr would suffer bodily injury as a result of his conduct. Those are different risks, different results, and different victims. Collateral estoppel does not apply.

ARGUMENT

Seeking to avoid prosecution for recklessly causing bodily injury to the other driver in the crash he caused, Appellant reached for the outer bound of double-jeopardy jurisprudence: collateral estoppel. Though framed as a double-jeopardy principle in *Ashe v. Swenson*, 397 U.S. 436, 445 (1970), collateral estoppel has no basis in the text or history of the Fifth Amendment's double-jeopardy clause and may not be available as a double jeopardy protection at all. *Currier v. Virginia*, 138 S. Ct. 2144, 2149–56 (2018) (plurality op.); *see also State v. Waters*, 560 S.W.3d 651, 663–64 (Tex. Crim. App. 2018) (Newell, J., concurring). But even under this Court's *Ashe*-inspired collateral estoppel precedents, Appellee's acquittal for manslaughter of Parnell does not bar his prosecution for aggravated assault of Loehr.

1. On pretrial writ, Appellant had the burden to show that his acquittal of manslaughter and criminally negligent homicide in the Parnell case barred prosecution for aggravated assault of Loehr.

Appellant raised his collateral estoppel argument as a double jeopardy claim. (CR at 106–07). When raising a double-jeopardy claim in a pretrial habeas application, the applicant bears the burden of proving his or her claim by a preponderance of the evidence. *Ex parte Peterson*, 117 S.W.3d 804, 818 (Tex. Crim. App. 2003), *overruled in part on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007).

2. The trial court's habeas determination is reviewed for abuse of discretion.

An appellate court reviews a trial court's decision to grant or deny an application for writ of habeas corpus under an abuse-of-discretion standard. *Pierson v. State*, 426 S.W.3d 763, 770 (Tex. Crim. App. 2014). This Court affords almost total deference to a trial court's determination of the historical facts that the record supports. *Id.* at 819. This Court affords the same deference to mixed questions of law and fact if the resolution turns on an evaluation of credibility and demeanor. *Id.* If, however, the trial court's determinations are questions of law, or are mixed questions of law and fact that do not turn on the witnesses' credibility and demeanor, then the appellate court reviews them de novo. *State v. Ambrose*, 487 S.W.3d 587, 596 (Tex. Crim. App. 2016). A decision to apply collateral estoppel is a question of law, applied to the facts, for which de novo review is appropriate. *State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007).

3. Appellee's acquittal in the Parnell manslaughter trial does not estop the Loehr aggravated assault prosecution because the manslaughter jury found nothing with respect to Loehr and her injuries.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. In a criminal case, this means that once a jury determines a discrete fact in favor of the defendant, the State cannot contest the jury's finding in a subsequent proceeding. *Ex parte Watkins*, 73 S.W.3d 264, 268 (Tex. Crim. App. 2002).

The test for collateral estoppel has two prongs. *Murphy v. State*, 239 S.W.3d 791, 795 (Tex. Crim. App. 2007). First, the court must determine exactly which facts were necessarily decided in the first proceeding. *Id.* Second, the court must determine whether any necessarily decided facts constitute essential elements of the offense in the second trial. *Id.* Collateral estoppel does not bar the State from prosecuting Appellant for the aggravated assault of Loehr because the Parnell jury found nothing with respect to the risk that Appellant's speeding would injure Loehr, or his causation of her injuries.

3.1. Appellant's criminal responsibility for the collision was not necessarily decided by the Parnell jury.

In applying the doctrine of collateral estoppel, courts must first determine whether the jury determined a specific fact, and if so, how broad—in terms of time, space and content—was the scope of its finding. *Watkins*, 73 S.W.3d at 268. Before collateral estoppel will bar re-litigation of a discrete fact, that fact must *necessarily* have been decided in favor of the defendant in the first trial. *Id.* The necessarily-decided test is demanding. *Ex parte Adams*, 586 S.W.3d 1, 5 (Tex. Crim. App. 2019). "A second trial is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question." *Id.* (citing *Currier*, 138 S. Ct. at 2150). To have been necessarily decided, "it would have had to have been *irrational* for the jury in the first trial to acquit without finding in the defendant's favor on the fact." *Id.* If there is a rational path to acquittal that does not require finding a discrete fact in the defendant's favor, then the fact was not necessarily decided. *See id.*

To make matters more difficult, criminal verdicts in Texas are general: *Guilty* or *Not Guilty*. *See* Tex. Code Crim. Proc. art. 37.07, § 1(a). In itself, a *not guilty* verdict indicates no single, discrete issue that was necessarily decided. *See Watkins*, 73 S.W.3d at 269. In searching for any facts that might have been necessarily determined by the first jury, "the natural place to begin is the jury's instructions from the first trial, which told the jury the particular circumstances under which it was to return a 'Not Guilty' verdict." *Adams*, 586 S.W.3d at 6.

3.1.1. The Parnell jury charge asked only about causing death to Parnell and the substantial risk of death to Parnell.

The charge in the Parnell manslaughter trial instructed the jury on two offenses, manslaughter as alleged in the indictment, and criminally negligent homicide as a lesser-included offense. (2 Suppl. at 5–7). The charge instructed the jury to acquit Appellant of manslaughter unless it found beyond a reasonable doubt that Appellant "recklessly caused the death of Parnell" by "operating the vehicle at an unreasonable speed, failing to control the speed, or failing to keep a clear lookout or control over the vehicle." (2 Suppl. at 5–6). The charge gave the statutory definition of *recklessly*:

> A person acts "recklessly" or is "reckless" with respect to the circumstances surrounding his conduct or the result of his conduct when he is aware but consciously disregards a substantial and unjustifiable risk that the circumstances exist or that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances, as viewed from the standpoint of the person charged.

(2 Suppl. at 3–4).

Read together, the jury was told to acquit Appellant of manslaughter unless it found that he both caused Parnell's death, and was aware of but consciously disregarded a substantial and unjustifiable risk that Parnell would die.

If the jury acquitted Appellant of manslaughter, it was instructed to consider criminally negligent homicide. (2 Suppl. at 6). The charge defined *criminal negligence* with respect to a result of conduct:

> A person acts with criminal negligence or is criminally negligent with respect to the result of his conduct, when he ought to be aware of a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances, as viewed from the standpoint of the person so acting"

(2 Suppl. at 6). The jury was instructed to acquit the defendant of criminally negligent homicide unless it found beyond a reasonable doubt that Appellant caused Parnell's death "with criminal negligence." (2 Suppl. at 6–7).

Read together, the jury was told to find the defendant not guilty unless it found that he both caused Parnell's death, and was aware of or should have been aware of a substantial and justifiable risk that Parnell would die.

3.1.2. The defense theory, as argued to the jury, did not fit neatly into the charge.

A commonsense reading of the record in this case illustrates why the necessarily-decided question must be informed by the charge, and cannot rest solely on the

arguments of the parties in the first trial. *See Adams*, 586 S.W.3d at 6, 8. Appellant's defense was that he suffered from severe mental health issues, documented since age nine, and may have had an unanticipated panic attack, and perhaps even a psychotic "break" while he was driving (though he had never had one before).

Legally, this psychotic-break defense contested the voluntariness of Appellant's conduct. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 9.4(b) (3d ed. Oct. 2019 update). But Appellant did not ask the trial court to include a voluntariness instruction in the jury charge. Consequently, the charge gave the jury little guidance on what to do with the evidence that Appellant suffered from a mental illness that could have caused a "break." *See Adams*, 586 S.W.3d at 8.

In closing argument, Appellant's defense team argued that the import of Appellant's mental health related to the *reckless* culpable mental state. One of Appellant's attorneys argued that since Appellant had never experienced a psychotic break before, he disregarded no known risk when he chose to drive. (CR at 504). The other argued that *reckless* really meant *intentional*, and claimed he should be acquitted based on a lack of evidence that he gunned the engine intentionally. (CR.513).

Yet the manslaughter application paragraph made it clear that the conduct at issue was Appellee's acts of driving unreasonably fast, failing to control his speed, failing to maintain a proper lookout, and crashing his car into the car Parnell was riding in—not his decision to drive. (2 Suppl. at 5–7). The charge also gave the statutory definition of *reckless*, so the jury could not have acquitted Appellant on the theory that *reckless*

actually meant *intentional*. Simply put, if the jury followed the charge, it could not acquit Appellant of Parnell's manslaughter on the psychotic-break theory as it was argued to them.

At best, the psychotic-break defense could have applied to the "aware of and consciously disregarded" portion of the definition of recklessness, in that if Appellant was truly having a complete psychotic break from reality, he could have been subconsciously disregarding all risk. But Appellant did not contest the evidence that he swerved to avoid a light pole and another car—evidence that indisputably showed his awareness of *some* risk. If the jury necessarily decided anything with regard to Appellant's lack of awareness of a risk, it was a lack of awareness of the precise risk identified in the charge: the risk that Parnell would die.

And if Appellant's lack of awareness of the risk were the necessarily-decided issue, the jury would not necessarily have acquitted Appellant of criminally negligent homicide, which does not require that element. The jury acquitted Appellant of criminally negligent homicide as well, indicating that if there was an ultimate issue resolved against the State, it was more likely to be something related to an element of both of those offenses.

3.1.3. There were multiple rational ways to acquit Appellant of the Parnell manslaughter that did not absolve him of all responsibility for the collision.

If applying the charge to Appellant's psychotic-break theory did not pave a clear path to acquittal, then what could? The two big things that manslaughter and criminally negligent homicide have in common: 1) causing death, and 2) a substantial risk of causing death.

A rational juror could find that Parnell's death was attenuated from and an unlikely result of the collision. At the scene, neither the Dallas Fire & Rescue paramedic nor a responding police officer considered Parnell to be "low sick," which is a term that first responders use when there is a "decent chance" of death. (CR at 268). Officers released Appellant at the scene, rather than arresting him. (CR at 270, 333). Loehr, who was in the same car and collision, lived. The hospital re-set Parnell's 83 year-old femur just fine. (CR at 307). Parnell eventually died—four days after the crash—not as a direct result of the collision, but from complications that arose while she was recovering. (CR.638). Parnell, who had hypertensive cardiovascular disease and chronic kidney disease, suffered a heart attack brought on by renal failure. (CR at 638). Even then, she was resuscitated, and only died when life support measures were discontinued. (CR.638). The medical examiner testified that Parnell died "as a result of blunt force injuries and/or complications." (CR at 307).

While that sequence of events might provide a legally sufficient relationship to the collision to satisfy the causation element of manslaughter, the jury received no

instruction on concurrent causation. *Cf.* Tex. Penal Code § 6.04(a). Appellant contested causation when his attorney suggested that the "accident" manner of death referred to a superseding cause occurring in the hospital a month after the collision. (CR at 308). A rational juror applying the jury charge to this evidence could conclude that the State had not proven beyond a reasonable doubt that the collision caused Parnell's death.

Furthermore, the attenuation of Parnell's death from the crash called into doubt whether any risk of Parnell's death Appellee could have or should have been aware of was substantial. After all, Appellant may have been aware that flooring it down the street was generally unsafe and carried some risk of injury, but he could not have known that Parnell was 83, that she had a history of chronic kidney disease, and that she would die from complications in the hospital four days after the accident. Following the charge, a jury could acquit Appellant altogether, either because the causation was attenuated or because the risk that a passenger in the car Appellant hit would die was not substantial.

Neither of these issues were necessarily decided because the jury could have made either determination in reaching its not-guilty verdict. The jurors themselves did not even need to agree on the reason to acquit. Half could have thought that despite causing the accident, Appellee did not cause Parnell's death, while the other half could have thought the risk Parnell would die was not substantial. But even if it were possible for the jury to necessarily decide both facts, neither precludes prosecution in the Loehr

aggravated assault case because neither says anything about the risk of causing bodily injury to Loehr.

3.2. The jury in Appellant's prosecution for aggravated assault of Loehr will be asked a different question: whether he consciously disregarded a substantial and unjustifiable risk that Loehr would be injured.

The Loehr aggravated assault prosecution can proceed because the recklessness question in that case is a completely different fact issue—whether Appellant consciously disregarded a substantial and unjustifiable risk that he would cause serious bodily injury. To collaterally estop a subsequent prosecution, the "particular fact litigated in the first prosecution" must be "the exact fact at issue in the second prosecution." *Id.* The issue must be "precisely" the same in both cases, which limits the doctrine to "cases where the legal and factual situations are identical." *Ex parte Taylor*, 101 S.W.3d 434, 441 (Tex. Crim. App. 2002) (internal quotations and citations omitted). In the pending aggravated assault case, Appellee is charged with disregarding a different risk, and causing a different result, than those passed on by the Parnell jury.

Aggravated assault, like manslaughter and criminally negligent homicide, is a result-of-conduct offense. *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008). The jury charge in the Loehr aggravated assault case will apply the *reckless* mental state to the prohibited result, bodily injury to Loehr. The recklessness question will be: Did Appellee consciously disregard a substantial and unjustifiable risk that Loehr would suffer bodily injury?

The Parnell jury necessarily decided nothing with respect to the risk that Loehr would suffer bodily injury. Momentary physical pain satisfies the definition of *bodily injury*. *See* Tex. Penal Code § 1.07(a)(8). Many acts can create a substantial and unjustifiable risk of bodily injury, while not creating a similar risk of death: throwing a paper airplane at someone's face, for instance, or leaving LEGOS on the floor. This means a person can be reckless with regard to bodily injury without being reckless with regard to death. So even if Appellant's first jury necessarily decided that he was not reckless with regard to the risk of Parnell's death, that does not foreclose the possibility that he was reckless with regard to the risk of injuring Loehr.

The court of appeals found otherwise because it made a mistake similar to the one made by the court of appeals in *Ex parte Adams*. In *Adams*, Appellant stabbed two people who were involved in an altercation with a third person. He was prosecuted for aggravated assault, and at trial he did not contest "whether the aggravated assault was proven." 586 S.W.3d at 7. In acquitting, the jury necessarily decided in his favor on his defense-of-a-third person justification. *Id.* at 8. But the court of appeals "applied the brush too broadly" when it decided that the jury's acceptance of the justification with regard to one of the complainants estopped prosecution for stabbing the other. *Id.* at 5. Because Adams's defense-of-a-third-person justification depended on the perceived use of force by the person stabbed, the defensive issue decided by the first jury did not encompass both people stabbed. *Id.* at 8. Adams could still be prosecuted for the second aggravated assault. *Id.*

Here too, the court of appeals applied the brush too broadly when it applied the jury's finding on a specific risk of a specific result to a specific victim to bar litigation of a different risk of a different result to a different victim. Though Appellant did not assert a justification, the jury was only asked to assess causation and risk with regard to Parnell's death, not Loehr's bodily injuries. Collateral estoppel does not apply.

CONCLUSION & PRAYER

Appellant has not been acquitted of "being reckless." He has been found not guilty of recklessly causing Parnell's death, a fact not at issue in the pending aggravated assault prosecution. The State prays that this Honorable Court reverse the decision of the court of appeals and affirm the trial court's order denying pretrial habeas relief.

Respectfully submitted,

/s/ Joshua Vanderslice
JOSHUA VANDERSLICE
Assistant District Attorney
State Bar No. 24095824
Frank Crowley Courts Building
133 N. Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399
(214) 653-3625 | (214) 653-3643 *fax*
joshua.vanderslice@dallascounty.org

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

CERTIFICATE OF COMPLIANCE

I certify that this document contains 4,613 words, according to Microsoft Word 2016, exclusive of the sections excepted by Tex. R. App. P. 9.4(i)(1).

/s/Joshua Vanderslice
JOSHUA VANDERSLICE

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing brief was served on Michael Mowla as counsel for Appellant Christopher Rion, and the State Prosecuting Attorney. Service was made on March 2, 2020 (Texas Independence Day), by EFile's e-service feature to michael@mowlalaw.com and information@spa.texas.gov.

/s/Joshua Vanderslice
JOSHUA VANDERSLICE